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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/812,743	03/30/2004	Ariel Shapiro	U 015097-8	5507
140 7590 02/08/2007 LADAS & PARRY 26 WEST 61ST STREET NEW YORK, NY 10023			EXAMINER LEFF, STEVEN N	
			ART UNIT 1761	PAPER NUMBER
SHORTENED STATUTORY PERIOD OF RESPONSE			MAIL DATE	DELIVERY MODE
3 MONTHS			02/08/2007	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

**Office Action Summary**

Application No.

10/812,743

Applicant(s)

SHAPIRO, ARIEL

Examiner

Steven Leff

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-33 is/are pending in the application.
- 4a) Of the above claim(s) 29-33 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-29 is/are rejected.
- 7) ☒ Claim(s) 15 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date 3/30/04, 8/22/05
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_

## DETAILED ACTION

### *Claim Objections*

- Claim 15 is objected to because of the following informalities: The phrase “permeability bag” appears to be repeated. Appropriate correction is required.

### *Claim Rejections - 35 USC § 112*

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

- Claims 1-10, and 17-29 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. Specifically, claims 1-7 and 17-23 contain subject matter which was not described or defined in the specification in such a way as to reasonably convey to one skilled in the relevant art how to make and/or use the invention. The specification does not provide sufficient description such that one skilled in the art would be apprised of what would constitute a gas treatment, vacuum cooling and what would further constitute fumigation, and how these treatments differ from one another.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

- Claims 1-29 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.
  - With respect to claim 1 specifically, it is unclear on how the produce could be sealed inside the bag while leaving the bag aperture open as is recited on line 8 of claim 1. Phrase one appears to conflict with phrase two.
  - Further with respect to claims 1 and 17, which read “sealing at least one of said at least one bag aperture and said at least one communications aperture”. The recitation of a selection from a group of elements in a claim should comply with accepted U.S.

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Patent practice with regard to the recitation of Markush grouping of claim elements. Phrases using “at least one” are open sets, and should recite elements in the alternative (i.e. “comprising A, B, C or D”), whereas closed sets (“consisting of”) should recite elements as “selected from the group consisting of A, B, C and D.”

- Claims 8, 11, 12, 24, 27 and 28 are indefinite due to the fact that it is unclear as to what the word “adhere” is meant to represent. The word adhere is a verb which requires a stated method of causing something to be support to or by something else. For instance, adhere could mean with an adhesive, or it could simply mean being supported or grasped by.
- Further with respect to claims 12, 27, and 28, where applicant acts as his or her own lexicographer to specifically define a term of a claim contrary to its ordinary meaning, the written description must clearly redefine the claim term and set forth the uncommon definition so as to put one reasonably skilled in the art on notice that the applicant intended to so redefine that claim term. *Process Control Corp. v. HydReclaim Corp.*, 190 F.3d 1350, 1357, 52 USPQ2d 1029, 1033 (Fed. Cir. 1999). The term “aperturing” in claims 12, 27, and 28 is not a word which is defined by common US language and therefore lacks a specific definition. It is unclear as to what is encompassed by this term.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

- Claims 1, 3, 5, 7, 8, 11, 12, 17, 19, 20, 23-25, 27 and 28 rejected under 35 U.S.C. 102(b) as being anticipated by Esty. (Re 28892)

Esty is taken as above.

With respect to claims 1, 3, 5, 7, 8, 11, 12, 17, 19, 20, 23-25, 27 and 28, Esty teaches a package for preserving perishable products, such as “fruits, vegetable, etc.” (col. 2 line 4+) Specifically with respect to claims 1, 11, 17, 25, and 27 Esty teaches a communication aperture in the wall of a container, (col. 2 line 8+) that contains a “flexible impermeable bag” (col. 2 line 1+) , which is viewed as a controlled permeability bag, that contains perishable products. Plastic tubes, which are hermetically connected to the impermeable flexible bag, (col. 1 line 30+) are aligned, and supported, by the walls of the container and the outlet openings in the wall of the container. (col. 2 line 9+) The plastic tube is connected to a hose for providing atmosphere treatment within the bag, (col. 2 line 42+) where sealing of the container after the atmospheric treatment is affected “by cutting of the plastic tube(s) with hot scissors.” (col. 2 line 67+)

Regarding claims 8, 11, 12, 24, 27, and 28 although Esty does not specifically teach “adhering a sealing layer to the outside of the carton,” Esty does teach a sealing layer on the outside of the carton which is adhered to the wall of the container. Further Esty teaches “aperturing” the bag and sealing layer in a single operation. Regarding the word “adhering” in claim 11, 12, 27, and 28, and the word “adhered” in claims 8 and 24, the specification does not clearly define (on page 8 lines 1+) what is meant to represent the word adhere(nce) and further states “any equivalent adherence of the bag to the carton in the region of aperture 16.” In the instant situation reference is given to a common dictionary meaning for the word “adhere” or “adhering”, where the definition reads “to give support, or maintain loyalty, to hold fast or stick by or as if by gluing, suction, grasping or fusing.” (Merriam-Webster online edition) Further a distinction is noted between the difference in the phrases “to be adhered” and “an adhesive” where an adhesive positively states the type of adherence. Thus regarding claims 8, 11, 12, 24, 27, and 28, Esty teaches a tube or tubes which are hermetically sealed to the flexible bag where the tube or tubes extend from the bag and are “alignable with and extend through the inlet and outlet openings, and are supported by the walls forming the openings of the container.” (col. 2 line 8+) The tube may be sealed, after treatment of interior of the bag by cutting the end of the tube with a hot scissor thus melting the open ends together. Regarding specifically claims 8, 11, 12, 24 and 27-28, it is the Office’s view that the “sealing layer” is the seal created by cutting the end of the tube with the hot scissors thus fusing the ends together. Although this step is taught by Esty after treating the produce a

first time, it is the Office's view that treatment may take place through the same tube multiple times by simply cutting the tube with non-heated scissors or by inserting a sharpened tool directly through the seal thus creating an opening, followed by re-cutting the tube with hot scissors thus re-producing a seal. Therefore, it is interpreted that with respect to the sealing layer being adhered to the wall of the container that Esty positively teaches this limitation when taking the word "adhere" for its' literal and broadest reasonable dictionary definition. In the instant case, Esty teaches that the wall of the container comprises openings which are formed to "support" or adhere the tube(s) to the container wall of the carton as the tubes extend there through, in order to provide enough support that the tubes are grasped by the walls of the container ensuring that the tube(s) maintain extended through the openings until physically removed. The tubes have been cut at their ends to form a sealing layer. The sealing layer may then be broken by cutting the tube with non-heated scissors or by inserting a sharpened tool directly through the seal thus creating an aperture in the sealing layer as recited in claims 8, 11, 12, 24 and 27-28.

With regards to claims 4, and 20, Esty teaches purging the container for a time sufficient to purge essentially all of the oxygen from the container, (col. 3 line 9+) and substituting an inert gas (col. 2 line 41+) within the treatment atmosphere.

With respect to claims 3, 7, 19, and 23, although Esty does not specifically recite the word "fumigation", Esty does teach that the lack of oxygen will cause any animal life included in the container to quickly suffocate and the produce will be protected from insect damage." (col. 3 line 14+) Esty further teaches the use of Nitrogen gas for its art recognized and applicants intended function of purging the bag of oxygen, thus eliminating insects within the bag containing the produce. In support of this position, an article by Stuart M. Bennett, on the website <http://www.the-piedpiper.co.uk/th7.htm> recites that "fumigation is the use of a gas (not the spraying of insecticides) to destroy pests which may infest a building or a product," where "virtually anything can be fumigated." (pg. 1 col. 3) Bennett continues by teaching that various gases may be used to fumigate a product or environment, and specifically names Nitrogen. (pg. 2) It is noted that MPEP 2144.04 states that "In considering the disclosure of a reference, it is proper to take into account not only specific teachings of the reference but also the inferences which one skilled in the art would reasonably be expected to draw therefrom."

(Thus the article by Bennett is not cited to modify the first reference but to merely provide support for the inherent teachings of Esty.) Therefore, Esty inherently teaches all of the limitations of claims 3, 7, 19, and 23, absent any clear and convincing evidence and/or arguments to the contrary.

With respect to claim 12, which recites the limitation "aperturing said bag and said sealing layer in a single operation," it is the office's view that when applying the cited dictionary definition for "adhere", that Esty adheres the bag to the container, adjacent the aperture in the container wall, and further apertures the bag and sealing layer in a single operation. Due to the fact that the tube is hermetically sealed to the bag, the bag is interpreted to be the bag and tube in combination where the tube has been cut by a hot scissor to form a seal. Therefore, a sealing layer is located at the end of the tube(s), where the sealing layer is supported or grasped by the container walls and when an aperture is formed in the sealing layer of the tube an aperture is consequently formed in the bag as well in a single operation.

Therefore regarding claims 1, 3, 5, 7, 8, 11, 12, 17, 19, 20, 23-25, 27 and 28 Esty teaches all of the limitations.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

- Claims 2, 5, 6, 18, 21, and 22, are rejected under 35 U.S.C. 103(a) as being unpatentable over Esty. (Re28892)

Esty is taken as above

With respect to claims 2, and 18 although Esty does not teach that the atmosphere treatment comprises vacuum cooling, Esty does teach that the gas treatment could be performed by evacuating the air by applying a vacuum. Esty continues by reciting that the tube can be connected to a hose, which is connected to a supply of inert gas. (col. 2 line 41+) In the instance where the tube is connected to a source which may supply cool air, Esty would thus be able to apply vacuum cooling to the container. Therefore one of ordinary skill in the art would have been motivated to change the source of the atmosphere treatment used to supply the inert gas to the package, with a source that supplies cool air instead thus allowing the contents of the treatment package to undergo different treatments, within the same bag, by simply changing the supply source. Further, it would have been obvious to one of ordinary skill in the art to change the supply source from a first treatment atmosphere to a second atmosphere thus not only allowing the contents of a package to be treated different ways, but would also allow the use of the container for treating different contents with different atmospheres depending upon the different characteristics of the given food type. In addition, the claimed method of packaging agricultural produce, differs from Esty only in that the atmosphere treatment applied in Esty uses inert gasses where the atmosphere treatment of the claims is drawn to a cool atmosphere. Claims 2, and 18 would have further been obvious over the prior art package in view of Esty, since the package is being used for performing the same function of treating a food product within a certain atmosphere, albeit in a different environment. (see MPEP 2144.07)

Therefore regarding claims 2, 5, 6, 18, 21, and 22 it would have been obvious to one of ordinary skill in the art at the time of the invention by the applicant to have produced a food package that was capable of accepting different treatment atmosphere.

- Claims 8, 11-12, 16, 24, and 27, are rejected under 35 U.S.C. 103(a) as being unpatentable over Esty (re28892) in view of Cabernoch et al. (4706827)

Esty is taken as above.



With respect to claims 8, 11-12, 16, 24, and 27, Cabernoch et al. teach a container arrangement, which employs a rigid outer sleeve closed at one end, and a flexible inner bag, where the inner bag is pre-filled and the container is hermetically sealed to isolate the contents from the environment, and further to maintain the contents in aseptic or sterile condition (col. 2 line 26+) thus allowing for storing and shipping of the containers. (col. 2 line 47+) Specifically, with respect to claims 8, 11-12, 16, 24, and 27, Cabernoch et al. teach a container which includes a flexible pouch that is oxygen impermeable and includes baby formula. (col. 3 line 67+) The pouch is "securely mounted within the sleeve by a rigid plastic disc disposed between the pouch and a nipple assembly." (col. 4 line 17+) "The flexible container can also be attached to the underside of the disc by an adhesive, in which case, a wider variety of materials may be used. The disk 30 has a generally thin center portion which defines the nipple access site and a relatively thick annular rim portion 32 which is rigidly secured to the shell, such as by heat or solvent bonding, adhesive or mechanical interlock. The center portion of the circular disk interior of the rim is substantially thinner than the rim for penetration by the nipple access member 26." (col. 4 line 24+)

To access the contents of the pouch a cap is removed and the nipple is moved from a retracted position to an accessing position for piercing the disc and as well as the wall of the pouch in order to permit dispensing of the contents. (col. 4 line 61+)

With respect to claims 8, 11-12, 16, 24, and 27, although Esty does not teach adhesively connecting the sealing layer to the container wall, Cabernoch et al. does teach the general principal of adhesively securing the disk (or sealing layer) to the container wall, and further teach adhering the bag or pouch within the container to the underside of the disc for its art recognized and applicants intended function of creating a seal between the outer container and the pouch to allow the pouch contents to be maintained in a non-perishable manner until so accessed, where the sealing layer and bag are penetrated in a single operation.

Although the container of Esty and Cabernoch et al. are utilized for different products, Cabernoch et al. provides a known means for sealing a container to prevent spoiling and further teaches a known means for opening the container. Therefore one of ordinary skill in the art would have been motivated to combine the teachings of Esty and Cabernoch et al. in order to produce a container which seals the contents thereof in an

environment which does not promote spoiling of the contents in order to increase the shelf life of the contents. In addition, one would have been motivated to combine the teachings of Esty and Cabernoch et al. to ensure that the contents are accessible from the outside of the carton thus avoiding the need to open the carton to access the contents. It would be advantageous to access the contents from the outside of the carton in order to seal the interior of the bag from the outside atmosphere thereby maintaining a specific atmosphere within the container and thus further decreasing the possibility of the contents to spoil or lose nutrients. Further, claims 8, 11-12, 16, 24, and 27 are obvious over the prior art of Esty since the container is being used perform the same function of storing a perishable food product within a certain atmosphere in order to keep the product from spoiling or deteriorating in nutritional value albeit that the containers of Esty and Cabernoch et al. contain different products.

With regards to claim 16, although Esty does not teach using a cap to cover the communication hole in the wall of the container, Cabernoch et al. does teach using a "plastic cover", (col. 5 line 26+) which is used to cover the dispensing end. In regards to the sealing method of Esty, one would be required to have hot scissors at all time in order to guarantee sealing. However the use of a cap would allow a sealing method to be readily available without the need of an additional step of heating of the scissors in order to obtain the seal. Further, depending upon the type of plastic tube that is used in Esty, the scissors may be required to be of a specific strength, or heat in order to cut through the plastic pipe where the plastic pipe is rigid. Therefore one of ordinary skill in the art would have been motivated to combine the teachings of Esty and Cabernoch et al. in order to provide a sealing method which did not require the use of hot scissors, thus providing a more readily available sealing method.

Therefore regarding claims 8, 11-12, 16, 24, and 27, it would have been obvious to one of ordinary skill in the art at the time of the invention by the applicant to have made a container where the sealing layer is adhered to the wall of the container, and where the bag and the sealing layer are penetrated in a single operation thus forming communication apertures.

- Claims 9, 10, 13-15, 26, and 28, and 29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Esty (re28892) in view of Wu et al. (5575418)

Esty is taken as above

With respect to claims 9, 10, 13-15, 26, and 28, and 29, Wu et al. teach “package systems for refrigerated modified atmosphere packaging of fresh fruit, vegetables and cut flowers. More particularly, this invention relates to the design, construction, closure, sealing and use of gas-permeable corrugated paperboard package systems for prolonging the storage life of fresh fruits, vegetables and cut flowers under modified atmosphere in the headspaces of the closed package system.” (abstract) The package may possess holes or ports in the end panels (col. 7 line 7+), which would allow for “vacuum cooling” and/or blowing in a specific gas mixture. “Thereafter, the ports 16 are covered with high gas barrier tape 20 (see FIG. 3c which illustrates an isometric view of a MAP container with folded ends, ports and a tape over the ports), or filled with high gas barrier or gas-permeable styrofoam plugs 22 (see FIG. 3b, which 3b illustrates an end section view of a MAP container wall with a plug through the port), or plugs with vent pinholes for increased influx/efflux of MA gases. The MAP containers may also be vacuum cooled, i.e. placed in a vacuum cooled enclosed room.” (col. 7 line 14+)

With respect to the paperboard package, Wu et al. teach that the paperboard package is made up of layers where one of the layers is “a layer of polymer having a gas permeability which permits gas to be transmitted in either direction through the polymer at prescribed levels.” (col. 3 line 36+) “The layer of polymer can be flexible and can have selected gas and moisture permeability,” (col. 4 line 13+) where the “composition of gases is selected to suit individual fresh fruit and vegetable products and their respective levels of respiration.” (col. 12 line 61+)

With respect specifically to claims 9, 10, 14, 15, and 26, although Esty does not teach that the flexible bag has permeability characteristics which are adapted to a given produce, Wu al. does teach the choice of permeability of the bag in respect to the produce which is contained within for the purpose of prolonging the storage life of fresh fruits, vegetables and cut flowers under modified atmosphere. Therefore, one of ordinary skill in the art would have been motivated to combine the teachings of Esty and Wu et al. in order to provide a package which not only contained the produce in an impermeable bag with a modified atmosphere but also allowed the flow of specific gases to be transmitted into or out of the package thus increasing the shelf life of the produce within, over a package which was only impermeable.

With regards to claims 13 and 29, although Esty does not teach using an adhesive sticker to cover the communication hole in the wall of the container, Wu et al. does teach using "high gas barrier tape." (col. 7 line 14+) In regards to the sealing method of Esty, one would be required to have hot scissors at all time in order to guarantee sealing. However the use of an adhesive sticker would allow a sealing method to be readily available without the need of an additional step of heating of the scissors in order to obtain the seal. Further, depending upon the type of plastic tube that is used in Esty, the scissors may be required to be of a specific strength, or heat in order to cut through the plastic pipe where the plastic pipe is rigid. Therefore one of ordinary skill in the art would have been motivated to combine the teachings of Esty and Wu et al. in order to provide a sealing method which did not require the use of hot scissors, thus providing a more readily available sealing method.

Therefore with respect to claims 9, 10, 13-15, 26, and 28, and 29 it would have been obvious to one of ordinary skill in the art at the time of the invention by the applicant to have produced a package which increased the shelf life of produce by selectively allowing certain gases to pass there through.

### ***Allowable Subject Matter***

There is no allowable subject matter at this time.

### ***Conclusion***


The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. 5458899, 5505950, 6305148, 5965185, 5575418, 4515266, 3450542, 4706827, 5619841, 5617711, 5609293, 5556658, 5505305, 4981007, 4535586, 4513907, 4474020, 4163494, RE28892, 3087655, JP-11334747. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Steven Leff whose telephone number is (571) 272-6527. The examiner can normally be reached on Mon-Fri 8:30 - 5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571)272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

SL

  
**KEITH HENDRICKS**  
**PRIMARY EXAMINER**